



Letter to the Editor

Uncertain testamentary capacity



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A B S T R A C T

This letter illustrates the significance of the legal rules that resolve uncertainty in assessments of testamentary capacity.

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Quoting British Geriatric Society guidelines, K.M. Kennedy's review article on assessing testamentary capacity states that the legal issue is whether it is "more probable than not that the person lacks or has testamentary capacity."¹ That's not quite right.

What if the likelihood of capacity is exactly fifty percent? In Britain, the will would be thrown out because the person defending it has the burden to prove capacity.² In other words, a tie on the capacity question scuttles the will. This is not just a hypothetical. In *re Gale* (Deceased), one expert's opinion was based on research that showed that in a sample group of patients with moderate dementia precisely half lacked testamentary capacity.³

Unlike Britain, most states in the U.S. place the burden to prove incapacity on the person challenging the will. That means the will is given effect if the capacity question is too close to call. The threshold in most states (as in Britain) is fifty percent, but a few states set the bar higher: the challenger must prove by "clear and convincing evidence" that the person lacked capacity.⁴ This elevated standard of proof—sometimes quantified as seventy-five percent certainty⁵—can also have an important impact.

In *Connor v. Schlemmer*, Ms. Connor scored ten out of thirty on the Mini-Mental State Examination ("MMSE") eight days after executing her will.⁶ The Rhode Island court nonetheless concluded that Ms. Connor had testamentary capacity. Of course, the MMSE does not measure testamentary capacity,⁷ but the two are correlated⁸ and ten is a very low score. Indeed, in the seventeen reported American capacity cases that include MMSE scores, this is the lowest score where the court found capacity. It is no coincidence that Rhode Island is one of the few states that apply the "clear and convincing evidence" standard.

In the cases in which medical experts are called, testamentary capacity will rarely be black or white. Knowing the jurisdiction's legal rules for resolving uncertainty is therefore essential.

Conflict of interest

None declared.

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